
THE
Antient and Present STATE
OF
MILITARY LAW
IN
GREAT BRITAIN
CONSIDER'D.

[Price One Shilling.]

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THE
Antient and Present STATE
OF
MILITARY LAW
IN
GREAT BRITAIN
CONSIDER'D:

WITH A
Review of the Debates of the ARMY
and NAVY BILLS.

*In Four LETTERS to a Friend
in the Country.*



L O N D O N :

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STATE OF NEW YORK

IN SENATE

JANUARY 1880

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

IN RESPONSE TO A RESOLUTION

PASSED BY THE SENATE

APRIL 1879



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THE
PRESENT STATE
OF
MARTIAL LAW, &c.

LETTER I.

S I R,

I PERCEIVE by yours that the Writers in the Opposition possess in a high Degree one of the Characters of a true Poet, laid down by *Horace*, I mean the
---- *Falsis terroribus implet*.----

My Province shall be that of a humble Critic; by endeavouring to prevent the surreptitious, and restore the true Readings of the two Bills, which have scattered such Panics all over the Nation, I mean those regulating the Government and Discipline of the Army and Navy. I know what Endeavours have been us'd to represent those two Bills, as establish-
B ing

ing not only unconstitutional, but new Powers in the Government, as laying the Ax to the Root of public and personal Liberty, and erecting the Independency of Military, upon Civil, Jurisdiction.

All those are Terrors I shall endeavour to quell, without applying to any Evidence but the Inspection of your own Eyes, and without looking for any Reward but the Satisfaction of removing those Prejudices which have already poisoned the Minds, and may hereafter endanger the Liberties of the People.

During the Opposition which was formed against the late Lord *Orford*, a kind of anniversary Debate was held in both Houses, upon the Act for punishing Mutiny and Desertion. The Subject of this Debate did not turn so much upon the particular Inexpediency of keeping up a great Number of regular Troops, as upon the general Danger which threatened the Constitution from keeping up any Number at all, or, at least, any Number above eight or ten thousand. When the Voice of the Nation hurried on the War with *Spain*, and called for that with *France*, those general Topics were dropped; and when the Rebellion was quelled, they were exploded. It appeared that the Invasion had been encouraged by the Dependence which the Pretender and his Friends had upon the Opposition, and who were ill enough advised, to suppose that every Man who had spoken
in

in Parliament against a standing Army, spoke with a View to serve the Jacobite Interest. Tho' this, in the End, proved to be a fatal Mistake for themselves, yet at first it almost proved so to the Nation.

I cannot, however, help observing, that during the Course of the Rebellion, the Necessity of a strict Discipline in the Army appeared more and more every Day. Perhaps the Security in which the Nation had continued for many Years, had relaxed the Nerves of that Discipline which Experience now teach us to preserve in time of Peace as well as War; nor am I in the least Doubt that to this Relaxation was owing the Success of the Rebels in two Battles against the regular Forces. It was the Glory of his Royal Highness to restore Discipline, and consequently Spirits, to the Army; and in that first Duty of a General, he check'd, for some Weeks, that Ardor which afterwards broke out so fatally for the Rebels at *Culloden*.

I shall take up none of your Time in proving what is generally admitted, that a Body of regular Troops is a necessary Evil to the Nation, nor, I am afraid, can we flatter ourselves, that, tho' the *Establishment* of them is *annual*, the Necessity of them will not be *perpetual*. I should, however, be sorry to see their Establishment render'd *perpetual*, because *annual* Revivals of it give the Legislature *annual* Opportunities of supplying

what may be defective, of retrenching what may be superfluous, of reforming what may be amiss, and preventing what may be dangerous, in a Body which, however necessary it may be, is undoubtedly unconstitutional.

The Necessity of the Existence of regular Troops enforces the Necessity of regular Discipline. At the Door through which Discipline goes out, Danger enters; nor perhaps is there, in the Mathematics, a Proposition more demonstrable than that, when an Army of Natives is commanded by Natives, who have Property in the Country, no Danger can accrue to that Country, if Discipline, or which is the first Principle of Discipline, Subordination, is preserved.

In all Reasoning those Inferences are the strongest that are built upon the narrowest Postulata, and tho' there is no Error more generally practised than to assume as granted, Matters which remain to be proved, yet I think I hazard no Reproach of that kind, when I lay down as the Basis of what I am to say, the following Maxim, viz. "That if an Army is necessary, Discipline is necessary to prevent that Army from being dangerous." The Practice of all free States confirm this Principle; for we are instructed by History that the People who have ever been most jealous of civil Liberty, have been most strict in military Discipline.

It is a ridiculous, tho' common Mistake, to imagine that this Discipline ought to be kept up only in time of War. The Danger to public Liberty from its Neglect, arises in time of Peace. In time of War, against a national Enemy, Self-preservation will oblige the Officers, and even the Soldiers, to preserve Discipline, because the Disuse of it must necessarily give an Enemy decisive Advantages. But when no Enemy is to be dreaded, and when Security is apt to render a Body of Men wanton, that Subordination which is inseparable to good Government, whether Civil or Military, has been sometimes so far neglected, that the Soldiers have forgotten their Subordination to Officers, and Officers their Dependence upon the civil Power. In a free State this Dependence, whether in Peace or War, is principally to be consider'd; because while that exists, and while Men of Property are at the Head of the Army, the joint Authority of the civil Power and Officers, has ever been sufficient to prevent all Disorders from the common Men.

In *England*, formerly, military Law was a dreadful Engine in the Hands of the Prince, and preserved as the last Resource against all (I will not say Disaffection, but) Disaffection. In times before the Revolution, nothing was more common than, upon any Backwardness in paying Taxes, upon any Symptoms of Non-compliance in Religion, upon

upon any Tumults thro' the oppressive Exercise of Prerogative, or any other Commotions that alarm'd the Government, to issue Proclamations, putting the Sword into the Hand of a General, and giving him a Power to proceed against the Refractory, by what was call'd *Law Military*. This Law reached as far as the General pleased: It never was defined but by Acts of Cruelty, nor is it possible in the History of the *English* Constitution to find out where it began, or where it ended. Even the Reign of *Elizabeth* is full of Proclamations, putting into the Hands of Generals those tyrannical Powers. As the Reader may, perhaps, be startled at so round an Assertion, which affects the Character of that glorious Reign, I must inform him that this martial Law was so much at the Disposal of the Crown, that it was upon very flight Occasions delegated to civil Magistrates. As a Proof of this I find that in the Year 1595, upon some Disturbances from the Apprentices of *London* and *Westminster*, the Queen issu'd out a Proclamation by which she put the Exercise of the martial Law into the Hands of *Sir Thomas Wilford*, Lord Mayor of *London*, and the Reader will perceive how far it extended, by the following Words of his Commission.

“ * We find it necessary to have some such notable, rebellious, and incorrigible Persons

* *Rymer's Fœdera*, Vol. XVI.

“ to

" to be speedily suppressed by Execution to
 " Death, according to the Justice of our
 " martial Law; and therefore we have made
 " choice of you, upon special Trust of your
 " Wisdom, Direction, and other Qualities
 " meet for this Purpose, to be our Provost
 " Marshal, giving you Authority, and so we
 " recommend you, upon Signification given
 " you by our Justices of Peace in our City
 " of *London*, or of any Place near to our
 " said City in our Counties of *Middlesex*,
 " *Surry*, *Kent* and *Essex*, of such notable
 " rebellious and incorrigible Offenders, wor-
 " thily to be speedily executed by martial
 " Law, to attach and take the same Persons,
 " and in the Presence of the said Justices,
 " according to Justice of martial Law, to ex-
 " ecute them upon the Gallows or Gibbet
 " openly, or near to such Place where the
 " said rebellious and incorrigible Offenders
 " shall be found to have committed the said
 " great Offences."

" And furthermore we authorize you, to
 " repair with a convenient Company into all
 " common Highways near to our said City,
 " where you shall understand that any va-
 " grant Persons do haunt, and calling to your
 " Assistance some convenient Number of our
 " Justices and Constables abiding about the
 " said Places, to apprehend all such vagrant
 " and suspected Persons, and them to deliver
 " to the said Justices, by them to be com-
 " mitted

“ mitted and examined of the Causes of their
 “ Wandring, and finding them notoriously
 “ culpable in the unlawful Manner of Life,
 “ as incorrigible, and so certified to you by
 “ the said Justices, you shall by our Law
 “ Martial cause to be executed upon the Gal-
 “ lows or Gibbet, some of them that are so
 “ found most notorious and incorrigible Offen-
 “ ders, and some such of them as have ma-
 “ nifestly broken the Peace, since they have
 “ been judged and condemned to Death for
 “ former Offences, and have had our Pardon
 “ for the same.”

The military or martial Law was then
 considered as an inherent Property of the Pre-
 rogative. Whatever Notions certain Gentle-
 men may affect to entertain of the *Wisdom*
 and *Freedom* of our Ancestors, I will venture
 to affirm that formerly it never was ascertain-
 ed nor restricted to that Body of Men, term-
 ed a Standing Army, but extended indiffe-
 rently over all Subjects, as often as the Pre-
 rogative thought proper to exert it. I am
 the more positive upon this Subject, because it
 has been lately a Fashion to represent Martial
 Law as an Innovation in the Constitution;
 but whoever will compare the Practice with
 the Wisdom of our Ancestors, whoever will
 examine at once the Exercise of Prerogative
 and the Enjoyment of Liberty, will perceive,
 that in latter Times, Martial Law has not
 been erected but explained; that it has not
 been

been enlarged, but bounded ; that it has not been rendered more severe, but more intelligible ; that it was formerly rivetted into the Government, but it is now dislevered from the Constitution ; that it was formerly looked upon as a Matter of Right, but now of Convenience, and that its Exercise, which often arose from Wantonness or Jealousy, now rests upon Duty and Necessity : Every Man now subjected to Martial Law knows his Privileges, and knows his Punishments, and the Nation in general is sensible, that it can exist no longer than the Wisdom of the Civil Power shall think proper.

I know it is a Doctrine extreamly out of Fashion to preach up the Existence of military Law, under the *Wisdom of our Ancestors*, or, that it was exercised according to the Will of the Sovereign. To say the Truth, I am by no Means fond of reflecting upon that *Wisdom* ; but when it is daily and hourly varnished up in Colours which it never wore ; when Gentlemen want to impose upon the Public the Phantom of their own Brains for the Wisdom of their Ancestors, it is the Duty of every Man to expose the Imposture. Would those Writers and Speakers, who value themselves upon the *Wisdom*, endeavour to learn the *History*, of their Ancestors ? Would they exchange *traditionary* for *certain* Knowledge of the Constitution ?

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there could be very little Occasion to blame or defend the Practice of past Ages.

You will naturally require some further Proofs of what I have advanced on this Head. Should I set down all that occur, I must, in a Manner, transcribe the *English* History. I shall therefore confine myself to one, but a strong one, and the rather because it immediately preceeded an Event, which I shall have Occasion to touch upon, in the Course of these Letters.

The great Debate upon the *Habeas Corpus* in the Reign of *Charles I.* was managed on the Side of the Commons, by Gentlemen, as well seen in the Constitution of *England*, as any she ever produced: They who managed for the Crown, in answer to the strong Objection brought by the Commons from the *Magna Charta*, which provides, “ that no “ Freeman shall be imprisoned but by the “ Law of the Land, &c.” endeavoured to break the Force of this Argument, by saying, *That the Martial Law was the Law of the Land.* Had the Martial Law never been known to the Wisdom of our Ancestors, this Answer never could have occurred, and had it not been practised, the Commons never would, as they did, have admitted it to be A *Law*, but not THE *Law of the Land*.

I hope I have proved to your Satisfaction, that a Martial Law existed under our Ancestors, and that the Exercise of it was committed

to

to Civil or Military Persons as the Crown saw convenient, and as often as it thought proper. I shall therefore leave you to reflect upon the Modesty of those Gentlemen, who have represented the Times before the Revolution as an Age of Gold, and *Military Law* as a Serpent, never known in the Paradise where our Fore-fathers lived.

That it was productive of many Calamities, and that it loudly called for Restraint and Regulation, I shall readily admit, and that the Army under *Cromwell* at last destroyed the Liberties of the Nation. But from what did this proceed? Not from the *Existence*, but the *Exercise* of the *Martial Law*. No annual Revivals of it were made by Parliament, and consequently the Army was taught to look upon its Constitution as independent upon the Civil Power. Thus, the great Link of Subordination was broken, and the *Law*, absolutely abolished the *Discipline*, of the Army. The inferior Officers, at whose Head *Cromwell* placed himself, turned out their Superiors, and, at last, the Superiors of their Superiors, the Parliament itself, who saw its Mistake when it was too late. There was, it is true, great Courage, great Regularity, and great Sobriety in that Army, but these are only the mechanical Parts of Discipline; they had long lost the Spirit of it, by drawing the Sword against their Superiors, both in the Field and Parliament. They had no certain

Rules prescribed them within which it was lawful, and without which it was dangerous, to act ; nor could they find any Safety, but by forming themselves into a Cabal against the Government, in which, after they were garbled of every Man who had dared to espouse the Civil Power, Subordination amongst themselves, and Rebellion against their Superiors, became the great Principles of their Success.

I am,

S I R,

Yours,

L E T T E R

L E T T E R II.

Of Military Law.

S I R,

I N my last, I proved the Existence of Military Law amongst our Ancestors, and I am now to prove the Mode of that Existence, and that the Military Law, as it now stands, retains all the good, and has lost all the bad Qualities, which it formerly possessed.

In Reigns preceeding the Revolution, a very different Idea was affixed to the Term "*Military Law*" from what we now entertain. As it has been fixed, by the Acts so much clamoured against, it can only relate to the Discipline of the Army within itself, and to that necessary Subordination which preserves its Dependence upon the Civil Power. No Subject of *Great Britain*, who is not immediately in the Army, can suffer by *Military Law*. Even in Cases of the most experienced Necessity, *Military Law* and *Military Execution* are totally distinct. *Military Execution* upon Civil Subjects (for so I chuse to distinguish all Subjects not under *Military Law*) is directed under *Municipal Law*, nor even in the Case of a Tumult, will a Military Officer, who understands his Business, proceed to Military Execution, but from a Civil

Civil Direction, or, in other Words, the Civil Magistrate must give the Word of Command to the Officer, before he give it to his Soldiers. This is, as I apprehend, entirely consonant to the Genius of the *English* Constitution, by which, in Cases of Resistance to the Civil Power, any Civil Magistrate, even so low as a Constable, can require the Assistance of ALL Subjects in the Discharge of his Duty.

How did this Matter stand under our Ancestors? The Crown rendered itself Judge of the Necessity, and the Necessity occurred as often as the Crown pleased: The Operations, in consequence of this Necessity, whether real or wanton, were not confined to the Army, but extended to all Subjects: and an Officer, with a Warrant in his Pocket for exercising Military Law, thought himself as justifiable in hanging up the Mayor of a Corporation as the Marodder of a Company.

As Military Law, therefore, now stands, the Army, with regard to Civil Powers, is no other than a disciplined and more ready Militia, to assist the Civil Magistrate in Cases of Tumult or Rebellion; and while Military Discipline is preserved, the Army becomes a Militia, far less dangerous than that employed by our Ancestors, which seldom knew where to stop, either in glutting Revenge, or in gratifying Avarice.

I know

I know it has been asserted, with great
 Airs of Triumph, that though the Military
 Law existed under former Governments, yet
 it was exercised only in Cases of actual War
 or Rebellion. But the Falaciousness of this
 Assertion must appear to any one who is in
 the least conversant with *English* History or
 Records. As I confine myself at present on-
 ly to Facts, I shall not take upon me to de-
 fend the Legality or Necessity of every Instance
 in which Military Law was exerted; I admit
 that it was often perverted to wicked Pur-
 poses, because its Operations were extended to
 Civil, as well as Military Objects. I shall
 even admit, that, when the Nation began to
 be sensible of its own Rights, many Remon-
 strances were made in Parliament and to the
 Crown, against the Exercise of Military Law
 in Times of Peace.

But to say that the Crown did not *enjoy* a
 Prerogative, because it was not always *exert-*
ing it, is, as if one should assert that there is
 no Money in a Gentleman's Pocket, and no
 Sword in his Scabbard, because he is not per-
 petually pulling out the one, or counting over
 the other. The Patrons of *English* Liberty,
 in the Reigns of *James* and *Charles* I. thought
 themselves entitled to oppose the *Enjoyment*,
 as well as the *Exercise*, even of lawful Prero-
 gative, when they felt it to be *oppressive*, or
 thought it to be *dangerous*. They made the
 most vigorous Remonstrances against the
 Crown

Crown retaining in its Hands the Wardships, and many other Branches of Prerogative, which they did not deny to be legal, but they conceived to be pernicious. In the great Stand that was made against Ship-money, the Opposition was founded upon the Crown rendering itself sole Judge of the Nation's Danger, and consequently of the Necessity of imposing the Taxes, when, and in what Manner, it pleased.

It happened in the Case of Military Law, that the *Enjoyment* of the Power was not more *dangerous* to the *Constitution*, than the *Exercise* of it was *oppressive* to the *Subject*. The Opposition, therefore, to it was swelled with a double Charge, nor were there wanting in both Houses, Men who gave it its full weight of Aggravations, with an Eloquence and Strength that would have done Honour to *Tully* himself.

But upon what were these Remonstrances founded? Not upon what gives rise to the present Clamour against the Bills in Question, but because the Civil Rights, and private Properties of the Subject were invaded, and sometimes destroyed, by the undue Powers which the Prerogative gave to the Army in Times of Peace. It would not be venturing much, should I challenge the greatest Opposer of the Army and Navy Bills, to produce one Instance of Complaint against Military Law, as it now stands, confined in its Operations to the

Army

Army only. It never was heard that a General, or superior Officer, was either blamed or punished for preserving the strictest Discipline, and the most regular Subordination in the Corps he commanded. No, all Complaints arose from the Neglect of Discipline. Discipline would have prevented every one of the Grievances complained of by the Opposition to the then Government. But as I should be sorry to advance any thing that is not indisputably founded on Facts, I shall beg Leave to submit to your Consideration the State of the Question with regard to Military Law, as it came before the House of Commons, 1628, in a Period of *English* Liberty, which is distinguished by no Measure more than the glorious Stand it made against that Encroachment of Government.

The Complaints, I say, which the Commons of *England* made against a standing Army in time of Peace, were not, as now, founded upon that Army (if I may use the Expression) being regular, but upon its being irregular in its Conduct, because it was irregular in its Direction. It was strongly admitted by the warmest Friends of the Constitution, by those whose Names are but so many Appellations for Liberty itself, that Military Law over Troops might be enacted by the Authority of Parliament, but they denied that the King, by Virtue of his Prerogative only, could, in time of Peace, issue

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Commissions for trying Subjects, whether Soldiers or Sailors, or others, and for executing or acquitting them by Martial Law, when their Offences were of such a Nature as to be cognoscible by the Law of the Land.

The excellent Words of the Petition of Right, will themselves give the Reader a much more concise View of this Matter.

“ And whereas, says the Petition, of late,
 “ great Companies of Soldiers and Mariners,
 “ have been dispersed into divers Counties
 “ of the Realm, and the Inhabitants against
 “ their Wills have been compelled to receive
 “ them into their Houses, and there to suffer
 “ them to sojourn, against the Laws and
 “ Customs of this Realm, and to the great
 “ Grievance and Vexation of the People.

“ And whereas also by Authority of Parliament, in the 25th Year of the Reign of
 “ King *Edward* the Third, it is declared
 “ and enacted, That no Man shall be fore-
 “ judged of Life or Limb against the Form
 “ of the great Charter, and the Law of the
 “ Land: And by the said great Charter and
 “ other the Laws and Statutes of this your
 “ Realm, no Man ought to be adjudged to
 “ Death, but by the Laws established in this
 “ your Realm, either by the Customs of the
 “ same Realm, or by Acts of Parliament:
 “ And whereas no Offender of what Kind
 “ soever, is exempted from the Proceedings
 “ to be used, and Punishments to be inflicted
 “ ed

" ed by the Laws and Statutes of this your
 " Realm ; nevertheless of late divers Com-
 " missions under your Majesty's great Seal
 " have issued forth, by which certain Per-
 " sons have been assigned and appointed Com-
 " missioners with Power and Authority to
 " proceed within the Land, according to the
 " Justice of Martial Law against such Sol-
 " diers and Mariners, or other dissolute Per-
 " sons joining with them, as should com-
 " mit any Murder, Robbery, Felony, Mu-
 " tiny, or other Outrage or Misdemeanor
 " whatsoever, and by such summary Course
 " and Order, as is agreeable to Martial Law,
 " and is used in Armies in time of War, to
 " proceed to the Trial and Condemnation of
 " such Offenders, and them to cause to be
 " executed and put to Death, according to
 " the Law Martial.

" By Pretext whereof, some of your Ma-
 " jesty's Subjects have been by some of the
 " said Commissioners put to Death, when and
 " where, if by the Laws and Statutes of the
 " Land they had deserved Death, by the
 " same Laws and Statutes also they might,
 " and by no other ought to have been, ad-
 " judged and executed.

" And also sundry grievous Offenders by
 " Colour thereof, claiming an Exemption,
 " have escaped the Punishments due to them
 " by the Laws and Statutes of this your
 " Realm, by Reason that divers of your Of-

“ ficers and Ministers of Justice have unjust-
 “ ly refused, or forborne to proceed against
 “ such Offenders, according to the same
 “ Laws and Statutes, upon Pretence that the
 “ said Offenders were punishable only by
 “ Martial Law, and by Authority of such
 “ Commissions as aforesaid, which Commis-
 “ sions, and all other of like Nature, are
 “ wholly and directly contrary to the said
 “ Laws and Statutes of this your Realm.”

The Quotation requires no Commentary to
 prove that the constitutional Objections urged
 by our Ancestors against Military Law, con-
 sisted in its being put in Force upon the
 Strength of Prerogative only, which they
 did not conceive to be sufficient for setting
 aside the Provisions of *Magna Charta* and the
 other Laws of the Land. It is extremely
 plain that the Patriots who form'd this Peti-
 tion, thought a Man might be *adjudged to*
Death by any Law which rested upon an Act
 of Parliament. It is said that *Omne majus*
includit in se minus, and from thence it may
 be inferr'd that the Powers of other Military
 Punishments are included in that over Life.
 But that Inference, specious as it is, must be
 tenderly treated in this Case. *Livy* relates
 that so general a Despondency, in a time of
 public Danger, prevailed over the *Roman* Sol-
 diers, that they could not be brought to a
 Sense of what they owed to their Country
 and to their own Honour, until their Offi-
 cers

cers roused them “ by Punishments more dreadful than Death itself.” It is to be hoped *Britons* will dread no less, than *Romans* ever did, the Punishment of Infamy, which the Historian means in this Passage, and for that Reason, the Cares of the *British* Legislature have been wisely and usefully employed in forming what we may call a Code of Military Law, whereby Punishments are proportioned to Offences.

Of these Offences none are more strictly guarded against than the Encroachments of the Military, upon the Civil, Power. To have specified all the Cases of such Encroachments, or to have guarded against every Instance of Military Insolence, would have been impossible any other Way, than, as the Law now stands, by lodging the Powers of a Jury in Courts Martial, and by enforcing the most rigorous Discipline.

It was the Want of Discipline in the Army which was so strongly complained of by our Ancestors. Dissolute and designing Courts have ever found their Account in throwing up the Reins of Discipline, and thereby suffering the Sword to prescribe to the Gown. Though the Opposition against *Charles* the First degenerated at last into a Monster, which swallowed up the Constitution, yet it, undeniably, at first, wore so Patriot a Face, that it was joined by every Man of Sense and Virtue in the Kingdom. Let us therefore, once more, hear in what Terms those Patriots who have

have dignified the Name of *Englishmen*, complained in their Remonstrances to the Crown, of the want of Military Discipline in the Army.

In a Petition of the Commons to the King concerning his Army, after laying down the Principles which they insist upon in the Petition of Rights, they mention the following dreadful Consequences of the Army being void of all Discipline.

I. “ * The Service of Almighty God is hereby greatly hindered, the People in many Places not daring to repair to the Church, left in the mean Time the Soldiers should rifle their Houses,

II. “ The ancient and good Government of the Country is hereby neglected, and almost contemned.

III. “ Your Officers of Justice, in Performance of their Duties, have been resisted and endangered.

IV. “ The Rents and Revenues of your Gentry greatly and generally diminished; Farmers, to secure themselves from the Soldiers Insolence, being by the Clamour of Solicitation of their fearful and injured Wives and Children enforced to give up their wonted Dwellings, and to retire themselves into Places of more secure Habitation.

V. “ Husbandmen, that are as it were the Hands of the Country, corrupted by ill Example of the Soldiers, and encouraged

* *Rushworth's Collections*, p. 542.

“ to idle Life, give over Work, and rather
 “ seek to live idly at another Man’s Charges,
 “ than by their own Labours.

VI. “ Tradesmen and Artificers almost dis-
 “ couraged, and being enforced to leave their
 “ Trades, and to employ their Time in
 “ preserving themselves and their Families
 “ from Cruelty.

VII. “ Markets unfrequented, and our
 “ Ways grown so dangerous, that the Peo-
 “ ple dare not pass to and fro upon their
 “ usual Occasions.

VIII. “ Frequent Robberies, Assaults, Bat-
 “ teries, Burglaries, Rapes, Rapines, Mur-
 “ ders, barbarous Cruelties, and other most
 “ abominable Vices and Outrages, are gene-
 “ rally complained of from all Parts, where
 “ these Companies have been and had their
 “ abode ; few of which Insolencies have been
 “ so much as questioned, and fewer accord-
 “ ing to their Demerit punished.”

Such were the Grievances which our An-
 cestors were obliged, in Justice to themselves
 and their Posterity, to spread before the
 Throne. But are not the Subjects of their
 Complaints owing to the Neglect of Military
 Discipline ? Does not every Article spring from
 the same Source ? Can any Man imagine that
 those Grievances could have existed, had the
 Army and Navy been governed by those Re-
 gulations, which are now reproached as In-
 novations in the Constitution, and dangerous

to

to *Englishmen*? If Military Force by Sea and Land, as is now universally admitted, is necessary to the Preservation of our Tranquility, if not, of our Freedom, will not the same Causes produce the same Effects? And might we not expect, if Military Discipline was relaxed or disused, to hear the like shocking Complaints, urged by the Voice of the collective, to the representative, Body of the People, and by them, to the Throne? Can the warmest Opposer of the Bills in Question deny that they contain effectual Remedies against all the Articles of Grievances which our Ancestors complained of, from the Neglect of Military Discipline; or can it be pretended, that the present Execution of that Discipline is not lodged in Men of such Rank and Property, that we must imagine every one of them to be a Felon, not only to his Country, but to himself, should he not consider himself, even in his highest Military Capacity, as dependent on the Civil Powers?

Upon the whole, therefore, of this Question, I hope there can now no Doubt remain, that the old Constitution did not complain of the Existence of Military Law, but of the Neglect of Military Discipline. That our Ancestors did not, as in many other Cases of Prerogative, remonstrate against the Crown's enjoying those Powers, which arose from its having the Direction of the Army; but for governing, *Edictis, non Legibus*, by arbitrary,

not

not by *constitutional* Provisions, which set up *Will* for *Law*, and which by disusing *Discipline*, endangered *Liberty*.

I know the Doctrine I have laid down will be termed *new*, but like other Modes, it appears to be so, only because we are not old enough to remember the Time when it was in *Fashion* before. I am sensible likewise that the Public has, for some Years, been taught the Reverse of this Doctrine; but Constitutional Reasoning is a Kind of Armour, which Journal and Speech-Writers have not yet proved, and they wield it as the *Cupids*, in Prints, handle the Club of *Hercules*. The political Distaff becomes their Hands much better, let them continue to spin out their flimsy Thread, but he must be a poor Wretch indeed whom it will, at this Time of Day, entangle. For my own Part, I have fairly laid before you, and I hope, fully supported, my Sentiments on this Head, regardless of all Authority that does not rest upon Fact, and preferring Truth to all Names, however distinguished, and to all Views however disguised.

I am,

S I R,

Yours.

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L E T-

L E T T E R I I I .

Of Military Law.

S I R,

HAVING in my two former removed the popular, but powerful, Prejudices against Military Law in general ; I come now to my principal Design of answering all the Objections brought, with any Effect, against the Rectitude of Military Law, as it now stands in *Great Britain*.

The Case of Martial Law, as regarding the Army, differs widely from that regarding the Navy. A Standing Army, in Time of Peace, without Consent of Parliament, is unconstitutional, and even with Consent of Parliament, may be dangerous. Regular Military Discipline is the only Preventive of that Danger ; for when every Officer and Soldier knows the Direction by which he is to act, and the Sphere in which he is to move ; when every Deviation from either is punished, and while the Chain by which Military depends upon Civil Power, remains entire, and without that Rust which it must necessarily gather without annual Revisals, there can be no Danger from Military Ambition. It has neither Room nor Leisure to look round ; and

an Army, in this Case, is like a mighty Machine, which, if irregular in its Direction, might have dreadful Effects, but, if kept in Order, its Operations are useful to Mankind, and may be guided by a skilful, though feeble, Hand.

But it has, I think, been universally admitted, that our Constitution never can be in Danger from the Greatness of our Naval Power, because it is our natural Strength. Parliaments, therefore, have not the same Jealousy of their Navy as of their Army, nor are annual Revivals of Naval Regulations either necessary or proper.

While every Man of Property in *England* was obliged by his Tenure to be a Soldier, Parliaments may be strictly said to have consisted entirely of Officers of the Army. The *Norman* Conqueror extended this even to Bishops themselves, by subjecting their Baronies to Military and Lay Services. Our Ancestors, therefore, were ignorant of the Distinction, in which we are so well instructed, between a Subject and a Soldier; nor do I know any Rules or Articles laid down for the Operation of Martial Law, except punishing Cowardice with Death. With regard to the Army, it seems rather to be understood than defined, and the few Directions on this Head that remain upon our Records, are no other than Orders sent from the Crown to the Generals, investing them with arbitrary Powers in the

Government of the Army. Even *Nathaniel Bacon**, the greatest Advocate we know of for popular Rights, as good as admits, that Military Law, in former Times, was in the Breast of the Sovereign.

But the Case was very different with regard to the Navy: Naval Power was not then considered to be the natural Defence of the Island; and our Ancestors were as jealous of their Fleets, as we are of our Army: For this Reason, the King and Parliament passed a Set of Military Articles†, for the better Regulation of the Navy, the Stamina of which still remain in the Laws relating to “the Government of his Majesty’s Ships, Vessels, and Forces by Sea.” In Progress of Time, as the Naval Power of *England* extended, and Naval Expeditions multiplied, those Articles received Additions; and as the Body of the Civil Law, amongst the *Romans*, was formed from the *Edicta Prætorum*, so the Military, Naval Law of *England*, when reduced into one Act under *Charles II.* was no other than a Collection of the Regulations that had been laid down by the *Howards*, *Raleigh*, *Monk*, and other great Sea Commanders, who sometimes differed in their Practice, and consequently, the Bill was found, in some Passages, to be inconsistent with itself, while the whole of it was confused and

* *Bacon’s Discourses*, p. 96.

† *Temp. Rich. I. Anno 1190.*

inaccurate. Our Navies, however, continued to be guided by this leaky System so long, that they could scarce keep above Water, and some late melancholy Instances prove, the Necessity of new modelling it by Parliament.

It is immaterial to take Notice of any Objections made to the general Facts I have laid down, for I know none worth mentioning. We shall therefore take up the two Bills in question upon this Footing, That it was agreed on, by all Parties, that strict Military Discipline, both in the Army and Navy, was absolutely necessary to our Safety, and that nothing could better deserve the Attention of the Legislature, than a “ A Bill for amending, explaining, and reducing into one Act of Parliament, the Laws relating to the Government of his Majesty’s Ships, Vessels and Forces by Sea.”

It is the Rectitude of this Bill, and that entitled “ An Act for punishing Mutiny and Desertion ; and for the better Payment of the Army and their Quarters.” That I am now to establish.

In order to this I shall not take upon me to retrace all the Debates that happened upon their first Forms. If they received any Alterations from those first Forms, one or other of the following Inferences must be admitted, viz. They either were not brought in by Gentlemen, who, because they had Places in the Administration, were sure of a dead Majority ;

Jority; or those Gentlemen, though sure of that dead Majority, were open to Conviction. The Subject of our Enquiry now is, whether the Alterations made in the Bills as they now stand, are not such as give an additional Security to the Freedom of the Constitution, and to the Safety of the Nation.

To prove the Affirmative of this, I shall lay before you the first material Alteration made in the Act for punishing Mutiny and Desertion. This is the more necessary, not only because the Matter itself is of great legal Importance, but because it has been boldly, if not dishonestly, misrepresented in Print, and in Terms, which, by ocular Inspection, are directly contrary to those now appearing on the Face of the Article.

The Article I mean is the fifth Article of War, which as it stood last Year, run thus,
 “ Any Officer or Soldier who shall strike his
 “ superior Officer, or draw, or offer to draw,
 “ or shall lift up any Weapon, against him,
 “ on any Pretence whatsoever, or shall disobey Orders, shall suffer Death, or such other
 “ Punishment, as shall, according to the Nature of his Offence, be inflicted upon him
 “ by the Sentence of a Court-Martial.” The same now runs thus, “ Any Officer or Soldier, who shall strike his superior Officer,
 “ or draw, or offer to draw, or shall lift up
 “ any Weapon, or offer any Violence, against
 “ him, *being in the Execution of his Office,*
 “ on

“ on any Pretence whatsoever, or shall dis-
 “ obey any *lawful* Command of his superior
 “ Officer, shall suffer Death, or such other
 “ Punishment, as shall, according to the Na-
 “ ture of his Offence, be inflicted upon him
 “ by the Sentence of a Court-Martial.”

Now, Sir, pronounce in whose Favour
 those Alterations are made, in that of the
 Civil, or that of the Military, Power. That
 it was right to guard against all Violence (be-
 sides that offered by Weapons) to a superior
 Officer, can, I think, scarcely be disputed,
 since due Subordination of Authority is the
 Life, and indeed the Essence, of Military Dis-
 cipline. But Superiors may have Resentments,
 Inferiors may have Passions; can it therefore
 be improper to guard against the ill Effects
 of both, by restricting the Punishment for
 this Offence to the Case of the offended Of-
 ficer being in the Execution of his Office.
 This guards against the Tyranny of a Supe-
 rior, who, as the Article stood before, might
 possibly from private Malice, have taken im-
 proper Opportunities to irritate his Inferior by
 a wanton Abuse of his Authority into a Be-
 haviour, by no Means consistent with Mili-
 tary Subordination, and therefore punishable
 as the Article stood before. But indeed I am
 free enough to own, that if there is a Fault
 in the whole Article, it is that of too much
 Relaxation, and it is possible that future Ex-
 perience may find it proper to make some
 Enlarge-

Enlargements of the Cases in which Violence offered to Superiors, are punishable by Death or lesser Penalties.

The next Alteration which occurs in this Article, is an Instance of unexampled, some will call it unnecessary, Delicacy. Many Gentlemen were of Opinion that as the Article stood last Year, a Soldier or an inferior Officer was obliged to obey *any Orders*, however illegal, of his superior Officer, and thus he had no Election but that of being shot by Military Law for Disobedience, or hanged by the Civil Law for obedience, of illegal Orders. Though it is a Maxim that unexperienced Inconveniencies ought not to be suggested from experienced Rules, and though I remember no Attempt that was made to bring an Instance of any Abuse arising from the Article as it was formerly worded, yet, such was the Indulgence of the one Party for the Scruples of the other, that the Article passed as it now stands. From this you may judge of the Veracity of those Writers, who have in Print suppressed the Amendment, and represented this Article as laying Inferiors, if required by their Superiors, under the Dilemma of cutting the Throats of their fellow Subjects, or of suffering Death if they should not.

I shall make no Remark upon the next material Alteration in the Articles of War,
but

but submit it to your Judgment whether it breathes any thing of that Martial Severity with which the Bill, establishing those Articles, has been branded. It occurs in Section 14th, Article 11th, which last Year run as follows, " Any Officer or Soldier, who shall, without urgent Necessity, or without the Leave of his superior Officer, quit his Pelatoon or Division shall suffer Death, or such other Punishment as shall be inflicted upon him, by the Sentence of a Court Martial." But as it now stands amended, it runs thus, " Any Officer or Soldier, who shall, without urgent Necessity, or without the Leave of his superior Officer, quit his Pelatoon or Division, shall be punished according to the Nature of his Offence, by the Sentence of a Court Martial."

It would be ridiculous and absurd to attempt to prove a thing that speaks so plain for itself, as that the above Amendments are on the Side of Caution and Lenity. But I now proceed to some Points, in which Gentlemen differed when the Bill was reported, and which indeed contain all the material Objections to the Act as it now stands.

The first material Objection offered to the Bill as it stood in the Committee related to the Clause, " Which obliges the Members of a Court Martial to take an Oath not to disclose upon any Account, or at any Time,

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" the

“ the Opinions or the Transactions of the
 “ said Court.”*

The Objections to this Oath were plausible; and as they serve equally against that taken by Officers of the Navy sitting in a Court Martial, I shall give them their full Weight.

It was said that this Oath took from Parliament that original and fundamental Power of impeaching Offenders however great, or of enquiring into Offences however circumstanced. That it was possible for the Members of a Court Martial from private or partial Considerations to commit the most crying Injustices; and that it was impossible for Parliament to apply Redress, because it was impossible to come at the Truth which this Oath absolutely and eternally seals up.

That the Innocent who might vote against an unjust Sentence of a Court Martial, are hereby confounded with the Guilty, and cannot, without the Crime of Perjury, set forth the Truth. It was farther urged that this Oath was inconsistent with the Common and Statute Laws of the Kingdom, since it precluded them in Cases where they might have a Right to interfere; and it was asked in what Manner an Inquest could proceed upon the Body of a Member of a Court Martial suddenly killed, upon some Dispute arising in

* Article 7th, Sect. 15, of the Articles of War.

the Court, since by this Oath the Inquest could receive no Information as to the Circumstances of the Quarrel, to direct them to find the Murder accidental, in Self-defence, or wilful. Upon all those Considerations an Amendment was offered to this Oath, " By which a Member of a Court Martial might reveal the Opinions of the same, in all Cases, wherein the Courts of Justice, as the Law now stands, have a Right to interfere, or if required thereto by either House of Parliament."

Notwithstanding the Plausibility of this Amendment, which was rejected, the Oath as it now stands, is the greatest Barrier that ever was formed for the Independency of the Army. It is the unavoidable Misfortune of Military Discipline, that the Dependence of Officers through all the Gradations of Service, is more immediate than it is under any Civil Constitution. An Officer therefore of superior Rank, with arbitrary Inclinations, has many Opportunities of resenting, and that with effect, the Behaviour of an inferior Officer in a Court Martial, when (as happens often to be the Case) the Superior is interested either in condemning or acquitting the Party accused.

The natural, and perhaps, the only, Remedy for this Abuse of Power is, to rescue the Inferior from all Dread of his Superior's Resentment,

sentment, by shutting the latter out from all Possibility of knowing how the Party voted, of knowing any Circumstance preceeding the Publication of the Sentence. By this Measure, Courts Martial are rendered independent, and Justice herself raised above either Fear or Favour, and every Influence that strips her of Dignity. Virtue in its own Nature is preferable to Vice, and consequently, Justice to Injustice. Tho' I am far from saying that the Secrecy provided by this Oath will be effectual, at all Times, in all Circumstances, and with all Men; yet I will venture to affirm, that it secures the Independency of Virtue and Justice, as far as it is in the Power of human Foresight to effect. To expect a Provision that will be a Security against all Cases of Injustice, is to expect from the Laws of Man, an Effect that never followed from those of God.

Thus far as to the Morality and Wisdom of this Oath of Secrecy. We are now to survey it on the Side of Legality and Expediency, and to find how far the Amendment offered was proper or improper, which will gradually bring me to answer the Objections which I have already stated to the Oath as it now stands.

I have often repeated it, That Military Establishments and Military Laws are necessary Evils in the Constitution, and the great
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Care of the Legislature ought to be to make them as similar as possible to the Civil Institutions, to mark out their due Bounds, and clearly to define those Cases that are proper for their Cognizance. No Attempt that I have heard of has ever been made, to prove that this has not been effectually done by the Act and the Articles in Question. If it is done, then it necessarily follows, that no Case properly cognoscible by a Court Martial is revivable in a Court of Law. The Provision, therefore, for the Courts of Law, in the Amendment offered, was unnecessary, and I am now to give my Reasons why I think it improper.

Boni est Judicis ampliare Jurisdictionem suam, is a Maxim that has been long adopted in *Westminster Hall*, and it is, perhaps, in consequence of this Maxim, that we daily see the Gentlemen of the Long Robe extending the Talons of Law, and forcing Parties, even against their own Inclinations, to have those Matters adjudged which might have been compromised. This being the Case, would it have been proper to have passed an Amendment, which, if I may so express myself, invited the Courts of Law to overhaul the Proceedings of Courts Martial? or could an Officer be said to act independently, when conscious that the Vote he was to give might be questioned in a Court of Law, and, perhaps, bring

bring Ruin upon himself and his Posterity? As the Act of Mutiny and the Articles of War have stood at all Times, the Excess of a Court Martial's Jurisdiction is the only Matter that can come under the Cognizance of the Civil Power, but that Excess is pointed out by the Case itself and the Sentence; nor is there any Occasion for Information from the Members of a Court Martial to discover it.

Great Part of the Reasoning against the first Part of this Amendment is good against the latter Part. The Act of either House of Parliament is no Act of the Legislature, and if the Case is so notorious as to call for a Parliamentary Remedy, the Notoriety itself is sufficient to produce that Remedy, without subjecting an Officer to the Dread of a Parliamentary Enquiry, which may affect his Life, Fortune or Liberty. Add to this, that all Inquiries are supposed to proceed from Ignorance, and even a House of Parliament, while it is in the dark, may stumble upon very improper Questions.

As to the Case of a Man being killed in a Court Martial, besides the Improbability of its happening, the Oath of Secrecy can be no Bar upon the Verdict of a Jury. It does not oblige the Members to conceal ought but their own Opinions and Votes, and an Officer may, with all Safety to his own Conscience, lay before an Inquest, as much of the

Rise,

Rise, Progress and Event of a Quarrel, as may enable them to bring in a Verdict.

But having said thus much, I must own, that some of the Objections to this Oath, as it was printed when the Articles were before the Committee, remain still unanswered. A Case may possibly, though not probably, be so circumstanced, that it is impossible for a Judgment to be formed upon it, without having Evidence of particular Opinions and Votes in a Court Martial, and the sacred Rights which Parliaments have to enquire and impeach, seemed to be too much hampered by the Oath. It was, therefore, found expedient to add a Provision, " That the Secrecy " should be observed, unless the contrary was " required by Act of Parliament." It was indeed objected, that this Act must have a previous Foundation, which can be no other than a Discovery of the Facts of the Court Martial, and which could not be had, unless the Members broke their Oath of Secrecy. But this Objection vanishes, when we reflect, that when a Case is so flagrant as to demand the Interposition of Parliament, the Notoriety must give rise to that Act, and thereby the Act becomes the Foundation of the Discovery, and not the Discovery, of the Act. For an Act of Parliament, remitting the Oath, is no penal Law, because it proceeds no farther than that Remission, and it is possible that
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the Discoveries made by it may not be of such a Nature, as to call for Parliamentary Censure. But even in Cases when a Parliamentary Censure may be necessary, the Rights of Impeachment and Inquiry remain still inviolated. They are Acts independent of the Oaths of Secrecy, or of the Act dispensing with that Oath, and rest upon what appears on the Face of Things as they lie before Parliament.

This leads me to the only remaining Objection to this Oath, I mean its confounding the Innocent with the Guilty. But when we reflect that the Oath is dispensable by Act of Parliament, this Objection is really no better than a Sound. Proceedings, when unquestioned, must be presumed to be lawful, and what is lawful to be right. While the Tenor of the Oath subsists, no Man can say to a Member of the Court " Martial," you did, or did not, vote so and so, and when the Case is questionable and notorious, a Parliamentary Interposition makes the proper Distinction: Nay, if we turn this Objection into another Light, we shall find it to be the strongest Argument that can be brought for an Oath of Secrecy, because it unfetters the Conscience from all Considerations arising from Fear, Shame, Friendship, and a thousand Circumstances that might, and often does, influence a Man, when it is publickly known how he has spoken or voted. Therefore, the best Expedient

expedient the Wit of Man can devise to exclude Guilt from the Proceedings of a Court Martial, is an Oath of Secrecy, because it secures a Man from Reproach and Censure without, and gives him Tranquillity and Freedom within. In short, the Expression of confounding the Guilty with the Innocent, can really have no meaning, because, in fact, no such thing as Guilt can enter into a Court Martial sitting under an Oath of Secrecy, unless we suppose that Guilt in its own Nature is preferable to Innocence. Hence it is, that the Wisdom of our Ancestors devised an Oath of Secrecy for the Grand Jury, whose Verdicts are as much Matters of Judgment, though not of definitive Judgment, as the Sentences of a Court Martial, and answer to what the Civilians call the *Præjudicium* or the *Præcognitio*.

If it should be asked why this Oath, if so expedient and necessary, does not extend to other Juries, and to all Courts? The Answer is ready, and tallies exactly with the Case of a Court Martial. Petty Juries try their Peers, and therefore they are not supposed to be in danger from their Resentment; but Grand Juries, like Courts Martial, often sit upon their Superiors, and a Bill may be found by Com-

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moners upon a Grand Jury against the greatest Man in the Nation.

But the Precautions for Secrecy in the exercise of Judgment are not peculiar to the *English*. For the greatest and freest Nations upon Earth, have ever thought them necessary for the Preservation of Justice, and the Independency of Suffrages. Hence it is, that Ostracisms prevailed amongst the *Greeks*, and Ballotting amongst the old *Romans*, and the modern *Venetians*, took place; and *Harrington*, with several other very ingenious Writers, have been at great Pains, to recommend the same Practice even to *English* Parliaments, where in some Cases it now prevails. But what is the Difference between an Oath of Secrecy and a Ballot? None with regard to the Effect intended; but there is a great Difference, as the Bills now stand, with regard to the Safety of the Parties. For should the most niquitous Judgment, ever given, appear upon a Ballot, it is simply impossible to distinguish the Suffrages; but the Provisions of the Oath being dispensible by Act of Parliament, removes this Impossibility, if a Discovery should ever be thought necessary.

I shall now submit to your Consideration, whether the Shadow of an Objection
lies

lies against this disputed Oath of Secrecy ; and whether, without it, it would be possible to secure the Justice and Independency of Courts Martial either by Land or Sea ?

I shall therefore proceed to the next Head of Debate, which was a Clause offered, " That no Revivals of the Sentences of " Courts Martial should take place so " as to inflict a severer Punishment." Though this Clause is far from being unreasonable, yet it is inexpedient, because it supposes, without any Proofs to support it, that some Abuses of that Kind had been committed in the Army ; a Supposition which may be dangerous should it prevail, and highly injurious to the Honour of the Army. It was indeed strongly urged, that it was against the Principles of natural Equity to try a Man twice upon the same Accusation. But, in fact, we see the very same Thing practised in Civil Courts ; for a Judge, in Cases of Acquittal, may desire a Jury to reconsider their Verdict ; and it has been known that a Jury has, upon such Reconsideration, brought in guilty those whom they had acquitted. I am far from saying, that, in this Case, Juries and Courts Martial are exactly parallel, but they are so far parallel, that it is possible both may be mistaken, and that the Acquittal of a Jury, is as much

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upon Oath, and, if not reconsidered, ought to be equally final, as the Acquittal of a Court Martial.

I had proposed to have considered the last and indeed the most material Objection to the Bill for punishing Mutiny and Desertion, as it now stands, I mean "the Case of Half-pay Officers being subject to Martial Law in time of Peace." But the Matter has grown already so much upon my Hands, that I must make it the Subject of another Letter.

I am,

SIR,

Yours, &c.

LETTER

LETTER IV.

Of Military Law.

S I R,

I HAVE already observed that, in the Days of our Ancestors, every Man who had Property was obliged, by his Tenure, to be a Military Officer or Soldier, and to do Service in the Field when his Sovereign called him out. *Henry* the Second was remarkable for no great Quality (of which he possessed many) more than by his strict Adherence to Military Discipline; and there are in his Reign, upon the Records of *England*, three memorable Instances to prove how arbitrary our Kings were in that Respect. For he stripped three great Barons of their Estates, (a Punishment never inflicted but for Treason) because they had not done their Duties as military Officers in the Field, and the Estate of one of them was given to his younger Brother, *because he was a better Knight*, that is, *a better Soldier, than the Elder*. Neither had Military Officers in *England*, formerly any Recess from Service, and they were bound upon Requisition from the Crown to attend their Posts.

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These Facts and Observations, I own, are little to the Purpose of this Letter, were it not to obviate that Doctrine now so industriously spread, as if *Englishmen* formerly knew no coercive Power that could summon them, as Subjects, to the Field, and when there, punish them as Soldiers.

Succeeding Times produced different Systems, both Civil and Military, and it was found absolutely necessary, not only for the Defence of *England*, against her disciplined Neighbours, but for the Benefit of rising Arts, Manufactures, and Commerce, to keep those two Branches more separate than they had formerly been. A Body of Men, whose Trade is War, now subsists under a Military Command, but under the Civil Authority; and it is my Purpose now to examine whether it is safe for the Nation, just in itself, or expedient for the Service, that all who, as Officers, receive Pay, should obey Orders.

Neither more nor less than this is the Question that has been so much agitated, and the Point that has been so much debated, as if it had been unjust to consider Half-pay as a retaining Fee for future Service, and not a Gratuity for past. That the Legislature has considered it in the former Sense (at least with Regard to Land Service) is plain by the following Article of War, which runs thus :

“ All Half-pay Officers are equally subject
 “ to Discipline, and to be commanded, when-
 “ ever the Good of our Service shall require
 “ their Attendance, as if they were actually
 “ upon Full Pay.”

Likewise the last Clause in the Bill for Mu-
 tiny and Desertion runs thus.

“ And whereas it may be otherwise doubt-
 “ ed, whether the Officers and Persons em-
 “ ployed in the Trains of Artillery, or the
 “ reduced Officers of his Majesty's Land
 “ Forces and Mariners, on the *British* and
 “ *Irish* Establishments of Half Pay, be with-
 “ in the Intent and Meaning of this Act, for
 “ punishing of Officers and Soldiers who
 “ shall mutiny or desert his Majesty's Service,
 “ and for punishing false Musters, and for
 “ Payment of Quarters : It is hereby enacted
 “ by the Authority aforesaid, that the Offi-
 “ cers and Persons employed, or that shall
 “ be employed, in the several Trains of Ar-
 “ tillery, or the reduced Officers of his Ma-
 “ jesty's Land Forces and Marines, on the
 “ *British* and *Irish* Establishments of Half
 “ Pay, but at all Times subject to all the Pe-
 “ nalties and Punishments mentioned in this
 “ Act, and shall in all Respects whatsoever
 “ beholden to be within the Intent and Mean-
 “ ing of every Part of this Act, during the
 “ Continuance of the same.”

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The Objection to the Safety of this Clause was founded upon the great Number of Officers which it subjects, in time of Peace, to Military Discipline, and by Consequence, has vested dangerous Powers in the Crown, or even a General. But this Point, though more debated, is perhaps less defensible, than any that occurred upon the whole Bill. If we are to consult Facts, and the Experience of past Times, we shall find that nothing has undone the civil Constitution of all other Countries more, than the emancipating, from Military Discipline, Men accustomed to Military Life, practised in Military Arts, and often impressed with Military Notions. Queen *Elizabeth*, and her Successors *James* and *Charles* the First, had suffered their Subjects to serve Abroad in the *Low Countries*, and gave them their Option of fighting either for the *Dutch* or the *Spaniards*. Thus, many Officers were formed upon that illustrious Theatre of War. When they returned to *England*, as Soldiers, they considered themselves to be bound to no Service, but to be independent of King and Parliament, and at Liberty to embrace any Party that Interest or Inclination pointed out. What was the Consequence of this? The Appeal was made by both Parties to Arms, and each was confident of Success from the great Number of Officers it could engage. The whole Body of the People in an Instant be-
came

came Soldiers ; the Nation, a Scene of Blood ; the War was fomented on both Sides by mercenary Officers, and each Party fought for those Liberties, which both wanted to destroy. It was the terrible Experience of this Calamity, strengthened by Motives of Compassion, that induced the Government to give Half Pay, which was not fully established, either upon the Land or Sea Service, till long after the Revolution. Would the Government have thought itself or the Nation safe ? Would it not have thought both to be in Danger had it been admitted that an Officer, the Moment he received this Half Pay, was no longer subject to Military Discipline, but might, without any Terror from Martial Law, have embraced the Cause of a common Enemy ; or without any Apprehensions from Civil Courts, have, in time of public Danger, thrown up his Military Character, while his Country received no Benefit from that generous Provision which she had secured to him ?

What then are the Dangers of obliging a Half Pay Officer to continue upon the Military Establishment ? It is admitted on all Hands, that while he is in full Pay, he must employ his Time, his Study, and, even his Sword, as his Superiors shall direct. There may possibly be Danger in this, but it never can happen till the Direction becomes wick-

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ed, nor prevented, but by the Virtue of the Army. It is to that Virtue we even at this Time trust, small as our Army is; it is to that Virtue we must have trusted, had this Bill been modelled as its warmest Opposers could have wished; and without this Virtue, should the Lords, the Commons, and the the People of *England*, intrench themselves behind Parchment up to the Teeth, the Sword will find a Passage to the Vitals of the Constitution.

Had all the Officers in *England* continued in Full Pay, great Apprehensions of Danger to the Constitution would have been formed; Apprehensions have been formed from their being subject to Military Law without receiving full Pay; but no Apprehensions are formed of their receiving Half Pay without that Subjection. Are we then to rate the Virtue of an *Englishman* at so poor a Rate as the Difference between Half Pay and Full Pay, and to imagine that a Man, who like another *Cincinnatus*, attends his Farm and rural Life with humble Wishes, shall feel his Ambition awaken, and his Virtue vanish, shall endanger his own and his Posterity's Rights, and draw the Sword against his Country, the Moment the Bait of doubling his Subsistence is thrown out? I own I cannot help being one of those who have a better Opinion, I will not say of *Englishmen*, but of Mankind; nor can I imagine

agine that any Officer on Half Pay, who, for the Sake of Full Pay, would become the Assassin of his Country, will not, from the same wicked Motives, rob upon the Highway, whether he is, or is not, subjected to Military Law. Therefore, as I have observed, the Virtue of the Army must be trusted to, be its constituent Parts many or few; nor are the Dangers arising from the Article we are now considering, comparable to those that would arise, by declaring Half Pay to be a mere Gratuity. Admitting the very faint Possibility of a Government, either Civil or Military, calling upon Half Pay Officers to serve against their Country, is there no Danger in taking from the Crown a Power that may be abused, and leaving it to the Subject who may abuse it equally, either by refusing to serve when his Service is absolutely necessary for his Country, or by misapplying the Abilities and Means he had acquired in his Country's Service, without being subject to any Penalty as a Soldier? It is true, Subjection to Military Law cannot prevent Treason; for Officers who incline to be Traitors, will become so, notwithstanding that Subjection. But while that Subjection continues, an Officer so inclined, is more immediately under the Eye of the Government; his Conduct is more canvassible, his Designs are more easily prevented, nor can he move one Step in the dark Paths

of Treason, but with the utmost Difficulty and Peril.

Many other Considerations might be offered to dissipate the Dangers which are said to hang over this Article, but those already suggested joined to what I have to offer upon the other two Heads, the Justice and the Expediency of the Article, will, I hope, be sufficient.

We therefore come to consider the Justice of this Article. It has been said, that Military Officers have never yet considered themselves, when on Half Pay, to be subjected to Military Law, and it has been urged with great Airs of Triumph, that this was so much the Sense of the House of Commons, that upon the breaking out of the Rebellion, Mr. *Walpole*, afterwards the Earl of *Orford*, moved for an Address, which was presented to the King, that he would be pleased to employ all Half Pay Officers, and put them upon Full Pay, which Address would have been quite unnecessary and improper, had the House understood Half Pay Officers to be as much subjected, as Full Pay ones are, to Martial Law.

But the utmost that the Opposers of this Bill contend for is a Gratuity, that is, a *Present made for past Services, but which is neither strictly due, nor can be legally evicted*. If this be, as I hope it is, the true Definition of a Gratuity, then it must follow, upon all

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the Maxims laid down by Casuists, that it is, and ought to be, received only in that Sense in which the Benefactor designs it; nor is it just that the Benefited should receive it only in his own Sense. But there was, even so early as the Year 1745, a striking Instance, in what Sense the Crown considered this Gratitude, (if that must be the Word,) to be conferred. For when some of the Half Pay Officers, then in the Government's Service, were taken by the Generals *Wills* and *Carpenter* at *Preston* in *Lancashire*, they were tryed and sentenced to be shot by a Court Martial. Upon some blind Doubts of certain Lawyers, a Rumour went that the Execution of the Sentence was suspended, and that the Officers were to be sent up to *London* to be tried by a civil Court. Upon this, so very clear were the King and his Ministry, as to the Terms upon which full Pay was held, that Mr. *Stanhope*, then Secretary of State, and a noble Lord, who was then Secretary at War, were directed by his Majesty to send Letters, (which I am told are still extant) directing the General to put the Sentence of the Court Martial in execution upon the Spot; and to bring the Prisoners back, if they were in their way to *London* before the Receipt of that Letter.

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As to the Address of the House of Commons, I can see no Impropriety in their advising such a Measure, and their promising to stand by the King in it, even tho' he had had a Power to do it without an Address. But giving this Objection all the Weight that is desired upon the other side, how can the Address of one House, zealous and perhaps uninformed, upon a pressing Emergency, be conclusive upon the whole Legislature? If they now, upon maturer Deliberation, are satisfied as to the Justice of this Article, the matter must stand upon its own Bottom and can by no means be influenced by the Sense of one House, which is not declarative of the Sense of the other Branches of the Legislature.

We now come to the third Point proposed to be considered, I mean the Expendiency of this Article. It was strongly admitted that a Juncture might happen when the King ought to have a coercive Power to oblige all Half Pay Officers to serve him. This appeared so reasonable that an Amendment was offered, empowering his Majesty, upon publishing his royal Proclamation, in a Time of Rebellion or Invasion, to oblige Half Pay Officers to serve upon full Pay, and this, it was urged, would answer all the Purposes of the Article before us, and remove all the Danger and Injustice apprehended

hended from it. I have already examined the two latter Circumstances, but I cannot be satisfied as to the Sufficiency of the Amendment. It seldom happens to be prudent for a Government to proclaim its Dangers. The wisest Governments have always silently countermined them. If Danger is distant and doubtful, so alarming a Proclamation, would have the most dreadful Effects upon the Minds of the People, and upon publick Credit, perhaps without answering any one good Purpose. If on the other hand, the Danger is near and certain, such a Proclamation will come too late, before Men who are habituated to another manner of Life, and unprepared for Service, because they do not look for it, can be in readiness to repair to the Posts assigned them.

But many Cases of Danger may arise to a Country, besides those of Invasion and Rebellion: Sedition, Smuggling, Mutinies, Tumults and a thousand other disagreeable Circumstances may happen, and all the Danger may chance to be confined to one County, or one Corner of a County, where a Half Pay Officer may reside, and where it may be necessary he should serve. But in such Cases, which happen every Day, is a Royal General Proclamation to issue all over the Kingdom, before a Half Pay Officer can be obliged to put

put himself at the Head of a Company of Men, which may be sufficient for all the Service required? I hope I need to say no more to convince you that the Military Law as it now stands, is so far from being more dangerous than before, that the few Alterations it has received have given additional Strength and Security to the Freedom of the Constitution, that it has restor'd Discipline, and closed up the Access of Tyranny, in the Army. I shall omit the Reasons why the Clause subjecting Half Pay Officers upon the naval Establishment was omitted in the Bill for regulating the Fleet, because all I proposed was to vindicate the Military Law, as it now stands, and because the greatest Opposers of the Mutiny Act admit, that the Navy cannot be under better Regulations than it is, by the now subsisting Act.

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